1982

State of Utah v. Bryon Dale Peterson : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18298
BRYON DALE PETERSON,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from convictions of Aggravated Burglary, Aggravated Assault and Assault in the Seventh Judicial District Court in and for Carbon County, State of Utah, the Honorable Don V. Tibbs, Judge, presiding.

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STATEMENT OF THE NATURE OF THE CASE

The appellant, Bryon Dale Peterson, was charged with one count of aggravated burglary, in violation of Utah Code Ann., § 76-6-203 (1953), as amended, and two counts of aggravated assault in violation of Utah Code Ann., § 76-5-103 (1953), as amended, and was tried before a jury in the Seventh Judicial District Court in and for Carbon County, the Honorable Don V. Tibbs presiding.

DISPOSITION IN THE LOWER COURT

The jury found appellant guilty of aggravated burglary, a first-degree felony, aggravated assault, a third-degree felony, and assault, a Class B misdemeanor. The trial court sentenced appellant to imprisonment in the Utah State Prison for a term not less than five years, which may be for life, for aggravated burglary, together with a fine of $10,000; for a term not to exceed five years for aggravated

assault; and for a term not to exceed six months for assault, all terms to run concurrently.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of appellant's conviction.

STATEMENT OF THE FACTS

Mrs. Sandra Dotson owned a home at 296 North 100 West, Price, Utah (T. 8). Due to leg surgery she slept on a couch in the living room, adjacent to the kitchen (T. 15). In the early morning of September 1, 1981, appellant entered Sandra's home, walked through the kitchen, and then peered through the doorway into the living room where Sandra was sleeping (T. 11, 12). Awakened by noises in the kitchen, Sandra noticed the appellant in the doorway and asked "Who in the hell are you?" (T. 12, 13). The appellant did not respond; instead, he approached Sandra and placed both hands around her neck (T. 13, 15). Sandra struggled, but the appellant beat her about the head and face, sat on her body and then strangled her (T. 16). Due to this vicious assault, Sandra lost consciousness (T. 18).

Tammy Dotson, Sandra's daughter, occupied a basement bedroom immediately below the living room where her mother slept (T. 43). Tammy was awakened on the morning of September 1, 1981 by an alarm clock set for 6:30 a.m. and her mother's

scream, which occurred simultaneously. She put on her robe, walked up the stairs into the kitchen and saw from the doorway the appellant sitting on top of her mother (T. 44). Concerned, Tammy asked "Mom, are you alright?" (T. 46). Her mother did not answer, but the appellant turned and looked at her (T. 47). Tammy ran for the back door but appellant caught her from behind by grabbing her wrist (T. 47). The appellant placed his hands around Tammy's neck and strangled her until she lost consciousness (T. 47). Moments later, Tammy regained consciousness, saw appellant beating and choking her mother, and then she ran out the back door to the home of a next-door neighbor, Ed McKinney (T. 49).

At 6:20 a.m. on September 1, 1981, Ed McKinney was awakened by screams coming from his front door (T. 89). Answering his door, he was told by Tammy that something was wrong at her house (T. 89). Mr. McKinney ran to the house, entered the back door and walked into the kitchen (T. 89). Mr. McKinney then observed the appellant lying over Sandra Dotson (T. 90). Mr. McKinney asked "What the heck's going on here?" (T. 91). The appellant responded "Nothing" and he then got up, walked past Mr. McKinney and left through the back door (T. 91-93). A kitchen light clearly illuminated the appellant's face as he left the Dotson home (T. 93).

Another neighbor, Richard Rathers, heard Tammy's screams and approached the house (T. 100). While in the street in front of the Dotson home, Mr. Rathers saw appellant

run from the house, get into an orange van and drive off (T. 101, 102).

At trial, both victims, Sandra and Tammy Dotson, and both neighbors, Ed McKinney and Richard Rathers, positively identified the appellant as the assailant who entered the Dotson home on the morning of September 1, 1981 (T. 20, 46, 91, 104).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY GRANTED RESPONDENT'S JOINDER MOTION.

Appellant's claim of error arises from a series of events which occurred within two months of his December 21, 1981 trial.

The original information filed against appellant contained two counts of aggravated assault and one count of aggravated burglary. During a November 9, 1981 preliminary hearing, appellant was bound over only for the two counts of aggravated assault. Appellant was arraigned for the aggravated assault charge on November 16, 1981 and trial was set for November 21, 1981 (T. 237).

On November 30, 1981, respondent refiled the aggravated burglary charge against appellant. Both the preliminary hearing and arraignment for the refiled charge

were held on December 16, 1981. Following the hearing, appellant was bound over for the aggravated burglary charge (T. 238). On the following day, respondent moved the district court to join the aggravated assault and aggravated burglary charges. The trial court granted the joinder motion on the first day of trial, December 21, 1981 (T. 5). Concerning the joinder motion, the prosecuting attorney asserts that prior to November 27, 1981, he communicated to appellant's counsel his intention to both refile and join the aggravated burglary charge (T. 246). Appellant's counsel denies that any mention was made of joining the refiled charge with the existing charge (T. 249).

Based upon this summary of events, appellant contends that he was unable to adequately prepare a defense to the refiled aggravated burglary charge, and was thus prejudiced by the trial court's joinder order. Appellant's claim, however, lacks merit.

Utah Code Ann., § 76-1-401 (1953), as amended, provides in part that a:

> "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Here, appellant's single objective was to maliciously assault the victim, and in so doing, he committed the separate crimes

of aggravated assault and aggravated burglary. Both crimes are closely related in time and incident to his criminal objective. Thus, respondent was entitled to join these different crimes in separate counts in the same information. Utah Code Ann., § 77-35-9 (1953), as amended.

However, § 77-35-9(d) provides that:

> If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses in an indictment or information . . . the court shall order an election of separate trials of separate counts . . . or provide such other relief as justice requires.

Appellant was not prejudiced because there was sufficient time between joinder and the date of trial for counsel to prepare a defense. Since appellant's claim is insufficient time to prepare a defense, it can profitably be compared to analogous claims arising from a trial court's refusal to grant a continuance.

In State v. McOueen, 14 Utah 2d 311, 383 P.2d 921 (1963), the defendant was charged with the crime of robbery. Following a dispute, the defendant dismissed his counsel less than two days before trial. The court appointed other counsel for the defendant. Shortly before trial defense counsel moved for a continuance and the trial court denied the motion. Following his conviction, the defendant appealed, contending that the trial court's refusal to grant a continuance was abuse of discretion. Affirming the conviction, this Court

concluded from the record that defense counsel was given adequate time to prepare for trial. See also: Johnson v. State, 90 Nev. 352, 526 P.2d 969 (1974) (change in counsel on eve of trial and motion to continue denied).

In the instant case, the interim period between joinder and trial of four days, provided defense counsel sufficient time to prepare a defense to the refiled charge. More importantly, defense counsel was told in a phone conversation on or before November 27, 1981 that respondent intended to refile on the aggravated burglary charge. Based upon this information, appellant can hardly claim surprise. Furthermore, preparation for the alibi defense would not be altered at all following refiling of the aggravated burglary charge because the charges arose from the same criminal episode.

Appellant claims, however, that he was allowed insufficient time to investigate another defense to the refiled aggravated burglary charge: whether the victim had consented to appellant's entry onto the premises. The issue of consent is a question of fact discoverable from the parties to whom and from whom the consent was given--i.e., the appellant and the victim. Since this issue of consent is rather limited, appellant strains a bit when he contends that four days was not adequate time to fully explore the issue.

The record does not support appellant's claim that he was prejudiced by joinder of the charges. Thus, the trial

court properly joined the aggravated burglary charge with the aggravated assault charge.

POINT II

THE TRIAL COURT'S FAILURE TO ARRAIGN THE DEFENDANT ON THE CHARGE OF AGGRAVATED BURGLARY WAS NOT REVERSIBLE ERROR.

In a February 17, 1982 hearing following trial, appellant moved the court for a new trial contending that he had not been formally arraigned on the aggravated burglary charge refiled on November 30, 1981 (T 235, 240). The court denied appellant's motion, ruling that the clerk at the start of trial read the information to appellant and that the clerk indicated that a not guilty plea had been entered, placing into issue all claims made by respondent (T. 254).

Appellant contends that this error is sufficiently egregious as to warrant a new trial. However, the law is well settled that if a defendant proceeds to trial without objecting to a failure to arraign on a charge, he waives his right to a formal arraignment, e.g., People v. Sanders, 80 Ill. App. 3d 809, 400 N.E.2d 468 (1980); State v. Anderson, 12 Wash. App. 171, 528 P.2d 1003 (1974). See State v. Budau, 86 N.M. 21, 518 P.2d 1225 (1974) (formal arraignment is not an indispensable stage in a criminal proceeding).

The facts of Anderson, supra, are sufficiently similar to those of the instant case to allow comparison.

There, the defendant was charged in an initial information of violating a firearms regulation and taking an automobile without the owner's consent. Eight days later the defendant was arraigned on the two charges. In the interim an amended information was filed against defendant charging two counts of burglary. Defendant, however, was never arraigned on the amended information. Following a trial on the merits, the defendant was found guilty of all charges. In a hearing following trial, the defendant moved the court for a new trial because he had not been arraigned on the burglary charges. The trial court denied the motion and the defendant appealed. Affirming the conviction, the Washington Court of Appeals held:

> The record shows defendant had a full trial on the merits as if a plea of not guilty had been entered on the two counts. He proceeded to trial without objection and without asking for a continuance after announcing he was ready to proceed to trial. By his conduct defendant effectively waived his right to a formal arraignment [citations omitted].
>
> We find no violation of due process.

528 P.2d at 1005.

Here, as in Anderson, the appellant had actual notice of the refiled charge and had a full trial on the merits as if he had pled not guilty. By proceeding to trial without objection, appellant waived his right to a formal arraignment. Furthermore, before the start of trial all

charges were read to the appellant along with a statement that a plea of not guilty had been entered. Any error committed effected no substantial rights of the appellant and was thus harmless. Utah Code Ann., § 77-35-30 (1953), as amended. Therefore, the trial court properly denied appellant's motion for a new trial.

POINT III

THE TRIAL COURT PROPERLY RULED THAT RESPONDENT WOULD BE PERMITTED TO REBUT APPELLANT'S ALIBI WITNESS.

In a hearing outside the presence of the jury, the respondent informed the court that it intended to put on Officer Dean Holdaway to rebut the testimony of Mrs. LeVan Seeley, an alibi witness (T. 170). Officer Holdaway was to testify about a statement made by Mrs. Seeley at the time of the crime that would be inconsistent with her alibi testimony (T. 171). Appellant objected because Officer Holdaway's name had not been submitted to him as a possible rebuttal witness (T. 172). The respondent stated that Mrs. Seeley was not identified as the person making the inconsistent statement until the day before trial; thus notice to appellant could not be given (T. 169). Following this exchange, the trial court ruled that putting on Officer Holdaway as a rebuttal witness was proper (T. 172). On this appeal, appellant claims the trial court ruling was erroneous.

Section 77-14-2, Utah Code Ann. (1953), as amended, states in pertinent part:

> (1) . . . The prosecuting attorney, not more than five days after receipt of the [defendant's alibi] list provided herein or at such other time as the court may direct, shall file and serve the defendant with the addresses, as particularly as are known to him, of the witnesses the state proposes to offer to contradict or impeach the defendant's alibi evidence.
> . . .
> (3) If a defendant or prosecuting attorney fails to comply with the requirements of this section, the court may exclude evidence offered to establish or rebut alibi. However the defendant may always testify on his own behalf concerning alibi.
> (4) The court may, for good cause shown, waive the requirements of this section.

In State v. Case, Utah, 547 P.2d 221 (1976), this Court addressed facts and issues similar to those raised in the instant case. There, defendant ws charged with aggravated robbery and during trial asserted a defense based upon alibi. Days after the robbery, a friend of the defendant confronted the victim store clerk and stated that the defendant was the culprit. During testimony at trial, the friend denied making the statement and the store clerk was recalled as a rebuttal witness although no notice had been given the defendant. Following conviction, the defendant appealed to this court alleging as reversible error the State's failure to give notice of rebuttal witnesses. Affirming the conviction, this Court held:

> [N]evertheless in this matter defendant knew that [the store clerk] would become a witness against the defendant and her testimony respecting the conversation with [defendant's friend] would have been known to the defendant had it been inquired into. [His friend] having been subpoenaed by the defendant was undoubtedly interviewed by the defendant or his counsel and we must assume that the defendant was apprised fully of his knowledge of the facts he would testify to if called. There is no showing that the prosecution intentionally attempted to make any concealment of the facts regarding the alibi or its refutation. We are of the opinion that the trial court was justified in waiving the requirements of the statute.

Id. at 523 (emphasis added). Enlarging upon its Case holding, this Court, in State v. Haddenham, Utah, 585 P.2d 447 (1978), stated:

> If defendant's implied knowledge as to the State's rebuttal witnesses would justify waiving the statutory requirements in the [Case] case, then a fortiori such analysis should hold true where the rebuttal witnesses had both already testified and defendant actually knew the content of their testimony.

Id. at 448.

In the instant case, appellant knew that Officer Holdaway would be called as an adverse witness and appellant also had implied knowledge about Mrs. Seeley's conversation with Holdaway had he inquired thereof. Furthermore, Holdaway, the rebuttal witness, had actually testified earlier. Thus,

invoking Case and Haddenham, the trial court properly ruled that respondent could put on its rebuttal witness without notice to the appellant.

POINT IV

ANY IMPROPRIETY IN A QUESTION PROPOUNDED BY RESPONDENT DID NOT AFFECT THE SUBSTANTIAL RIGHTS OF APPELLANT AND THUS THE TRIAL COURT PROPERLY DENIED HIS MOTION FOR A NEW TRIAL.

During presentation of the defense, the appellant called as a witness Evan Reid (T. 179). During cross-examination of this witness, respondent asked "Mr. Reid, are you Mr. Peterson's parole officer?" (T. 180). To this question appellant interposed an objection which was sustained by the trial court (T. 181). Based in part upon this question, appellant moved for a new trial (T. 244). The motion was denied by the trial court (T 254), and raised as error on appellant's appeal before this Court.

Section 77-35-24(a), Utah Code Ann. (1953), as amended, states:

> The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

Consideration of Case, supra, is also instructive in the resolution of this issue. There, during examination of a

witness, inadvertent reference was made to the fact that the defendant had left the prison the day before the alleged crime. The defendant moved for a mistrial which was denied by the court. Following his conviction, the defendant appealed, claiming as error the court's denial of the mistrial motion. Affirming the conviction, this Court held that denial of a mistrial was proper because no further mention was made by either counsel or the court about defendant's prison term and the prosecution did not intentionally seek to elicit the information. 547 P.2d at 223.

In an effort to distinguish the instant case from Case and to come within the ambit of § 77-35-24(a), appellant claims that the question asked Mr. Reid was an intentional effort to discredit him. The record contains no evidence that the State intended to discredit appellant, nor did counsel raise such a claim in the conference convened to consider the objection. In fact, during the new trial motion hearing, the State claimed the question was only designed to obtain the witness' occupation (T. 248). Furthermore, any person sitting as a witness may be examined about his background and occupation for the purpose of aiding the jury in its evaluation of the witness' testimony and credibility. State v. Brewer, 26 Ariz. App. 408, 549 P.2d 188, 195 (1976).

Thus, the offending question was neither intended to discredit appellant nor did it have a substantial adverse effect upon his rights. Therefore the trial court properly denied the new trial motion.

POINT V

THE TRIAL COURT PROPERLY REFUSED APPELLANT'S MOTION TO STRIKE THE WORD "AGGRAVATED" FROM ALL COUNTS OF THE INFORMATION.

After the State concluded its case in chief and during a hearing outside the presence of the jury, the appellant moved the court to strike the word "aggravated" from each count in the information. The court below denied the motion, and appellant claims this denial was error.

Utah Code Ann., § 76-5-103(1)(b) (1953), as amended, provides:

> A person commits aggravated assault if he commits assault as defined in section 76-5-102 and:
> He uses a deadly weapon or such means or force likely to produce death or serious bodily injury.

Appellant's attack on the trial court's order is premised upon his conclusion that the victim, Sandra Dotson, suffered no serious bodily injury. Appellant relies upon State of Utah in the Interest of William N. Besendorfer, Utah, 568 P.2d 742 (1977) and claims that because the victim there suffered more severe injuries than Sandra and since this Court ruled that the injuries to the victim there were the result of an assault, not aggravated assault, the trial court here erred when it denied appellant's motion. Appellant's analysis,

however, is fundamentally flawed. It was the position of the respondent, and the fair import of the evidence presented, that appellant used "such means of force likely to produce death" and not necessarily to produce serious bodily injury (T. 166). Since the aggravated assault statute is stated in the disjunctive, such a showing is sufficient. It is not necessary to prove death or serious bodily injury occurred, but only that the actor used means or force likely to have that result.

The facts contained within the record show that appellant attacked Sandra, placed both hands around her neck and applied sufficient pressure to cause her to black out. Clearly, such force would likely have caused her death had not Sandra's daughter and neighbor appeared to frighten appellant away. Thus, the facts presented in the State's case in chief were sufficient to require appellant to put on its defense to the aggravated assault charge.

Appellant also contends that the alleged burglary was not aggravated and thus the word "aggravated" should have been stricken from the information. Utah Code Ann., § 76-2-203(1)(b) (1953), as amended, states:

> A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary, the actor or another participant in the crime causes physical injury to any person who is not a participant in the crime.

The requirement here is physical injury, not serious bodily injury, and it is a term equivalent to "bodily injury" defined in Utah Code Ann., § 76-1-601(a) (1953), as amended: "'Bodily injury' means physical pain, illness, or any impairment of physical condition." Due to appellant's attack, the victim, Sandra Dotson, certainly suffered as a minimum physical pain and some impairment of physical condition; thus appellant's conduct falls within the ambit of § 76-6-203(1)(a), the aggravated burglary statute.

Appellant also argues that since § 76-6-203 is based upon "physical injury", a term not statutorily defined, it must be void for vagueness. This claim is groundless because the term "physical injury" is equivalent to the term "bodily injury" which is defined by the Utah Criminal Code. It is also a phrase of common meaning which needs no further definition.

In sum, appellant in his attack caused bodily injury and used such force that was likely to produce death; thus the trial court properly denied his motion to strike the word "aggravated" from all counts in the information.

POINT VI

THE $10,000 FINE IMPOSED AT SENTENCING WAS NEITHER EXCESSIVE NOR AN ABUSE OF TRIAL COURT DISCRETION.

For appellant's conviction for aggravated burglary, a first-degree felony, the trial court imposed a fine of

$10,000 (T. 232, 233). On this appeal, appellant claims that the fine was excessive and disproportionate to the seriousness of the offense.

Utah Code Ann., § 76-3-201(1)(a) (1953), as amended, states:

> Within the limits prescribed by this chapter, a court may sentence a person adjudged guilty of an offense to any one of the following sentences or combination of such sentences:
> (a) To pay a fine; or . . .

In addition, Utah Code Ann., § 76-3-301(1) (1953), as amended, states:

> A person who has been convicted of an offense may be sentenced to pay a fine not exceeding $10,000 when the conviction is of a felony of the first degree.

In State v. Harris, Utah, 585 P.2d 450, 453 (1978), this Court further noted:

> Upon conviction of a crime whether by verdict or by plea, the matter of the sentence imposed rests entirely within the discretion of the court, within the limits prescribed by law (emphasis added).

Appellant claims, however, that since neither of the victims incurred permanent injuries, disfigurement or long-term medical expenses, imposition of the fine was abuse of trial court discretion. The purpose of a fine is not solely for making restitution to one's victims. Thus, Utah Code

Thus, Utah Code Ann., § 76-1-104 states in relevant part:

> The provisions of [the Utah Criminal Code] shall be construed in accordance with these general purposes.
> (1) Forbid and prevent the commission of offenses. . . .
> (3) Prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders.

The trial court, in effecting § 76-1-104, could have decided that in this particular case the maximum fine, together with imprisonment, would most clearly deter the appellant from future crime and most appropriately punish him for crimes already committed. Based upon this view of the sentencing procedure and the seriousness of appellant's crime, the fine imposed was neither excessive nor abuse of trial court discretion.

POINT VII

THE TRIAL COURT PROPERLY PERMITTED THE STATE TO AMEND THE INFORMATION AT THE CLOSE OF ITS CASE.

On the second day of trial in a hearing outside the presence of the jury, the State moved the court to amend the information so that § 76-5-103(1)(b) would be the basis for the aggravated assault charge instead of § 76-5-103(1)(a). The State argued that such an amendment would more clearly

reflect the evidence already presented (T. 166). Over appellant's objection the trial court granted the motion amending the information (T. 167).

The appellant argued during the motion, and argues here, that he had come prepared to defend the aggravated assault charge on the basis of § 76-5-103(1)(a), serious bodily injury, not § 76-5-103(1)(b), force likely to produce death.

Utah Code Ann., § 77-35-4(d) (1953), as amended, permits an "information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced." Appellant admits that no additional or different offense was charged, but he argues that his substantial rights were prejudiced by the amendment. However, weighing the evidence presented at trial up to the time of the motion, such a claim is groundless.

Utah Code Ann., § 76-1-601(a) (1953), as amended, defines "serious bodily injury" as a:

> bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ or creates a substantial risk of death.

The record indicates that the victim, Sandra Dotson, did not suffer permanent disfigurement or loss of a body member or organ, but was placed under a substantial risk of death.

Essentially, for this particular case, § 76-5-103(1)(a) was eqivalent to § 76-5-103(1)(b) because the force used by appellant was likely to produce death. Furthermore, the amended information would require no change in appellant's defense at trial nor would additional preparation be required.

This Court recently decided State v. Ricci, Utah, ____ P.2d ____ (Case No. 18165, filed September 29, 1982) in which the appellant contended it was error to allow an amendment to the information after the parties rested to include the language "or remained in" in a burglary charge. Appellant made the same claim in Ricci as is advanced here, to which this Court responded:

> This contention is without merit since the amendment did not change the basic charge from the burglary alleged to some other charge. The information charged defendant by Title and Section, which apprised him of the statutory offense and which included the very phrase about which defendant now takes issue.

Id. at p. 2 of the opinion. Since no substantial rights of appellant were prejudiced, the trial court properly permitted the information to be amended.

POINT VIII

RESPONDENT PRESENTED SUFFICIENT EVIDENCE AT TRIAL TO SUPPORT APPELLANT'S CONVICTION.

Appellant argues that evidence proffered in support of his alibi was sufficiently compelling to render

insufficient, as a matter of law, that evidence which reasonably supports his conviction.

When faced with an insufficiency of evidence claim, this Court accords great deference to conclusions reached by the jury in matters solely within its province:

> It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses, and it is not within the prerogative of this Court to substitute its judgment for that of the factfinder. This Court should only interfere when the evidence is so lacking and insubstantial that reasonable men could not possibly have reached a verdict beyond a reasonable doubt.

State v. Lamm, Utah, 606 P.2d 229, 231 (1980) (emphasis added). Thus, this Court's function is not to determine guilt or innocence, the weight to give conflicting evidence, or the credibility of witnesses. State v. Lamm, supra; State v. Gorlick, Utah, 605 P.2d 761 (1979). In State v. Logan, Utah, 563 P.2d 811, 814 (1977), this Court recast its review standard in rather succinct terms: "[U]nless there is a clear showing of lack of evidence, the jury verdict will be upheld." Furthermore, this Court has stated that its review of the evidence and those inferences reasonably deduced therefrom will be conducted in the light most favorable to the jury verdict. State v. Kerekes, Utah, 622 P.2d 1161, 1168 (1980). In addition, the defendant bears the burden of establishing that the evidence presented at his trial was so inconclusive

and insubstantial that reasonable minds must have entertained a reasonable doubt concerning his guilt for the crime charged. Id. at 1168.

The only credible evidence presented at trial which supported appellant's alibi was the testimony of appellant's father. His father, Mr. Charles Peterson, testified that he heard appellant come home at 5:30 a.m. on September 1, 1981 (T. 151). Although Charles Peterson did not see his son come home, he heard the gate open and moments later heard the refrigerator door open (T. 151, 159). The probative value of Charles Peterson's testimony is further reduced because his sister-in-law and her husband were also living in the Peterson house (T. 157).

Most damaging, however, is the positive eyewitness identification of appellant by Sandra and Tammy Dotson and their two neighbors. When viewing the totality of the evidence in a light most favorable to the jury verdict, a reasonable mind would entertain no reasonable doubt about appellant's guilt. Therefore, his conviction was supported by sufficient evidence.

CONCLUSION

Appellant was accorded a complete and fair trial which resulted in a conviction overwhelmingly supported by

the evidence. Therefore, respondent respectfully requests this Honorable Court affirm appellant's conviction.

Respectfully submitted this 13th day of April, 1983.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Bryce K. Bryner, Attorney for Appellant, 690 East Main Street, P.O. Box 444, Price, Utah, 84501, this 13th day of April, 1983.

Susan Patton